No. 5483

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSE GANDARA,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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To the Honorable Frank H. Rudkin, Frank S. Dietrich and Curtis D. Wilbur, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Plaintiff in error respectfully but very earnestly asks for a rehearing of this cause. He firmly believes that upon further consideration this court will direct a reversal of the judgment below.

Before discussing the action of the trial court in refusing to give the instruction proposed by plaintiff in error embodying his theory of the case or in giving instructions which in substance advised the jury that plaintiff in error was guilty as charged if he merely furnished arms and ammunition to the group of

twenty-three Yaqui Indians, who had been engaged in the insurrection in Mexico and who came to Tucson for the purpose of obtaining arms and ammunition (Tr. p. 77), and then returning to Mexico to rejoin the insurrectionists, plaintiff in error desires to call the court's attention to certain matters shown by the record which in his humble opinion entitle him to a reversal.

I.

UNDER THE INDICTMENT, PROPERLY CONSTRUED, THE ONLY ALLEGED CONSPIRATORS WERE PLAINTIFF IN ERROR, BISHOP NAVARETTE, AND DEFENDANTS BORGARO AND VALENZUELA. BISHOP NAVARETTE WAS ACQUITTED, A NOLLE PROSEQUI WAS ENTERED AS TO BORGARO AND VALENZUELA, AND PLAINTIFF IN ERROR ALONE WAS CONVICTED. INDIVIDUALLY, HE COULD NOT HAVE COMMITTED THE CRIME OF CONSPIRACY.

Plaintiff in error was charged with engaging in a conspiracy with Bishop Navarette, Esteban Borgaro, Jr., and Antonio Valenzuela, his co-defendants, to violate Section 13 of the Federal Penal Code. For the purpose of specifying the exact charge against the defendants, the indictment alleged:

> "that is to say, at the time and place aforesaid, the said **defendants** did conspire to set on foot and provide and prepare the means for an enterprise having for its objects the inciting of armed rebellion in the Republic of Mexico of the citizens of said Republic of Mexico against the government and authority there, and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion, and an enterprise which was to be carried on from Tucson, Arizona, aforesaid, **by the said defend-**

ants, devising the plan of the same there." (Tr. p. 3.)

We would ask the court to mark well that the indictment, properly construed, charges that the *defendants* conspired to set on foot and provide and prepare the means for the alleged unlawful enterprise and that the said enterprise was to be carried on from Tucson, Arizona, by the *defendants* who devised the plan of the same there.

The defendants named in the indictment were plaintiff in error, Bishop Navarette, Esteban Borgaro, Jr. and Antonio Valenzuela. The trial proceeded only as to Bishop Navarette, Esteban Borgaro, Jr. and Plaintiff in error. Bishop Navarette, whose name was linked with plaintiff in error throughout the trial, was liberated upon a directed verdict for the reason that the court found that the evidence was insufficient to establish his guilt. (Tr. p. 15.) The jury disagreed as to the defendant Borgaro. (Tr. p. 20.) Subsequently, upon motion of the District Attorney, the cause was dismissed as to the defendants Borgaro and Valenzuela. (Tr. p. 26.) It follows, therefore, that of all the defendants named in the indictment as conspirators, plaintiff in error alone was convicted, his co-defendant, Bishop Navarette being acquitted at the court's direction and a *nolle prosequi* being entered as to defendants Borgaro and Valenzuela.

Plaintiff in error contends that under the circumstances, the cause should be reversed as to him. The charge upon which plaintiff in error was brought to

trial was not the violation of Section 13 of the Federal Penal Code. The specific charge was that he and his co-defendants *conspired* to set on foot and provide and prepare the means for a military enterprise having for its objects the inciting of armed rebellion in the Republic of Mexico and the furnishing of arms, munitions, etc., for carrying on and supporting such rebellion *and an enterprise which was to be carried on from Tucson, Arizona, aforesaid, by the said defendants who devised the plan of the same there.* (Tr. p. 3.)

The union of minds of at least two persons is a prerequisite to the commission of the crime of conspiracy.

Feder v. United States, 257 Fed. 694, 5 A. L. R. 370;

State v. Jackson, 7 S. C. 283, 24 Am. Rep. 476.

If all of the conspirators, excepting one, are either acquitted or released upon a nolle prosequi, the basis of the charge is removed and the remaining defendant cannot properly be convicted.

Feder v. United States, supra;

State v. Jackson, supra;

Wharton's Criminal Law (11th Ed.) Sec. 1675.

It may be contended by the District Attorney that the indictment not only charged that the plaintiff in error and his co-defendants, Borgaro, Valenzuela and Bishop Navarette conspired together, but that they also conspired with divers other unknown persons to commit the offense against the neutrality statute. It is true that in the opening part of the indictment the

defendants were charged with conspiring "together and with divers other persons whose names are to the grand jurors unknown" to commit the offense of knowingly, wilfully, unlawfully and feloniously beginning, setting on foot and providing and preparing the means *for a certain military enterprise* to be carried on from the State of Arizona against the Republic of Mexico. In that part of the indictment, the charge was made practically in the wording of the statute, without any attempt to specify what the alleged military enterprise was or in what it consisted. The defendants were, of course, entitled to be informed as to exactly what they conspired to do and as to the nature of the alleged military enterprise. To give that very information to the defendants, the indictment specified the charge as follows:

> "*that is to say,* **THE SAID DEFENDANTS** *did conspire to set on foot and provide and prepare the means for an enterprise having for its objects the inciting of armed rebellion in the Republic of Mexico of the citizens of said Republic of Mexico against the government and authority there and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion in an enterprise which was to be carried on from Tucson, Arizona, aforesaid,* **BY SAID DEFENDANTS**, *devising the plan of the same there.*"

Manifestly, the indictment, taken and considered as a whole, charged that the defendants, and the defendants alone, entered into the conspiracy and charged that the unlawful enterprise for the purpose of inciting armed rebellion in the Republic of Mexico was to be carried on by the defendants and the de-

fendants alone. Under the circumstances, the reference in the first part of the indictment to "divers other persons" whose names were unknown should be entirely ignored.

The specific military enterprise referred to in the indictment was one having for its objects the inciting of armed rebellion in the Republic of Mexico and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion—and the only ones charged with conspiring to commit that crime were the defendants named in the indictment. It was necessary for the indictment to go still further and show that the military enterprise was "to be carried on from" the United States. Accordingly, the indictment charged that the unlawful enterprise, having for its object the inciting of armed rebellion in Mexico *"was to be carried on from Tucson, Arizona, aforesaid,* BY THE SAID DEFENDANTS", who devised the plan of the enterprise there. It is quite evident that no one other than the defendants Gandara, Borgaro, Valenzuela and Bishop Navarette, were charged with carrying the enterprise forward from the United States.

It is respectfully submitted, therefore, that under the terms of the indictment the only co-conspirators of the plaintiff in error were defendants, Borgaro, Valenzuela and Bishop Navarette. Bishop Navarette stands acquitted. The charge against Messrs. Borgaro and Valenzuela was dismissed on motion of the District Attorney. We repeat, therefore, that the very basis of the charge has been removed and as this

fact is disclosed by the record before this court (Tr. p. 26) the judgment against plaintiff in error should be reversed.

Even though the indictment were properly open to the construction that not only the named defendants, but also certain unknown and unnamed persons were the alleged conspirators, there is absolutely no evidence in the record showing or tending to show that there was any conspiracy between the plaintiff in error and any unknown or unnamed person or persons. If there were any unknown and unnamed conspirators, they must be found among the Yaqui Indians—and the record will be searched in vain for evidence establishing that there was any conspiracy between the plaintiff in error and any Yaqui Indian.

While there was some evidence to the effect that plaintiff in error and Bishop Navarette visited some of the Yaquis and spoke of obtaining ammunition and supplies for them, there was no evidence that those Yaquis did anything other than listen to the conversation—there was no evidence that the Yaquis, or any of them, agreed to receive or accept the ammunition or supplies, or that they entered into any agreement or arrangement of any kind with plaintiff in error, or any of the other defendants. And if the record shows that any ammunition or supplies were later furnished by plaintiff in error, there is not a scintilla of evidence showing or tending to show to whom the ammunition and supplies were furnished, or that the Yaquis, if any, who received the ammunition and supplies were those whom plaintiff in error and

Bishop Navarette visited and conversed with—and there was no evidence at all that the Yaquis, if any, who were furnished with the ammunition and supplies had any agreement or arrangement or understanding of any kind with plaintiff in error or Bishop Navarette.

The evidence was entirely insufficient to establish that any Yaqui Indian set on foot or provided or prepared a means for or took part in any military expedition or enterprise against the Mexican government to be carried on from the United States. But even if the evidence abundantly established that one or more Yaquis had thus violated Section 13 of the Federal Penal Code, that fact would be entirely immaterial as that was not the charge laid in the indictment. The Yaquis may well have been guilty of violating the neutrality statute without being guilty of the crime of conspiracy. Indeed, the Yaquis may have been guilty of conspiring among themselves to violate said statute without being guilty of the crime of conspiring with plaintiff in error to violate it. We emphatically repeat that there was no evidence that any Yaqui Indian was a co-conspirator of plaintiff in error—and there was no evidence that any unknown or unnamed person was a co-conspirator of plaintiff in error. Under the evidence the only possible co-conspirators of plaintiff in error were his three co-defendants. And, as we have stated, one of them was acquitted and the District Attorney entered a *nolle prosequi* as to the other two—thus leaving plaintiff in error to have conspired only with himself.

II.

THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY THAT PLAINTIFF IN ERROR COULD BE FOUND GUILTY EVEN THOUGH HE DID NOT CONSPIRE WITH THE NAMED DEFENDANTS, PROVIDED THAT HE DID CONSPIRE WITH ONE OR MORE OF THE YAQUI INDIANS.

In view of the indictment which charged that *the defendants conspired* to set on foot and provide and prepare the means for a military enterprise, which had as its object the inciting of armed rebellion in the Republic of Mexico, and further charged that it was a military enterprise which was *to be carried on from the United States by the defendants, who devised the plan of the same there,* it was clearly error for the trial court to charge the jury that if plaintiff in error conspired with one or more of the Yaqui Indians and with no one else, he may be found guilty of the charge of conspiracy. The court gave that very instruction when it instructed the jury as follows:

> "You will observe, Gentlemen, that the indictment alleges that the conspiracy was formed among Jose Gandara, Esteban Borgaro, Junior, Antonio Valenzuela, alias Chito Valenzuela, and Bishop Navarette and the charge is that they did combine and confederate together to violate the laws of the United States, and with divers other persons, whose names are to the Grand Jurors unknown, so that in order to convict, in the event that you do not find both of these defendants guilty of the conspiracy you might find one of them guilty—*in other words, if these two men did not conspire, as charged in the indictment, between themselves, but you believe that one of them did conspire with one of the other persons named in the indictment, or with those whose names are to the Grand Jurors unknown,—for*

> *instance, one or more of the Yaqui Indians—then, one of the defendants may be found guilty, the one so conspiring, and the other acquitted.*" (Tr. p. 221.)

If the jury believed that the defendants, or two or more of them, did not conspire to set on foot and provide and prepare the means for an enterprise, having for its objects the inciting of armed rebellion in the Republic of Mexico, and the furnishing of arms, munitions, supplies and money for carrying on and supporting such rebellion, then plaintiff in error should have been acquitted, for that was the very conspiracy with which he and his co-defendants were charged in the indictment. And as the indictment charged that the enterprise was one "to be carried on from Tucson, Arizona, aforesaid, by the said defendants, devising the plan of the same there," the defendants were entitled to an acquittal, unless the evidence warranted a finding that the enterprise was to be carried on from that place. The indictment did not charge that the Yaqui Indians, or in fact anyone other than the named defendants, conspired to set on foot and provide and prepare the means for the military enterprise, which had as its object the inciting of armed rebellion in the Republic of Mexico; and the indictment did not charge that the Yaqui Indians were to take any part in carrying on the alleged unlawful enterprise from Tucson, Arizona, or that the Yaqui Indians participated in devising the plan of said enterprise. Therefore, the jury should not have been instructed that the plaintiff in error

could be held upon the charge of conspiracy if he conspired with one or more of the Yaqui Indians and with no one else. In fact, the jury should have been instructed that under the terms of the indictment a verdict of guilty as to plaintiff in error could not be returned, unless the evidence disclosed that plaintiff in error conspired with one or more of his co-defendants to set on foot and provide and prepare the means for the military enterprise, having for its object the inciting of armed rebellion in Mexico.

It may be urged by the government that plaintiff in error took no exception to that part of the charge wherein the court instructed the jury that plaintiff in error could be found guilty, even though he did not conspire with any of the named defendants, provided that he did conspire with one or more of the Yaqui Indians, or with any other unnamed person—and that, therefore, plaintiff in error has waived the right to predicate error upon that part of the charge. If plaintiff in error is correct in his contention that he was entitled to an acquittal, unless the evidence justified a finding that he had entered into a conspiracy with one or more of the named defendants, and that it was not sufficient for the government to merely prove that he conspired with one or more of the Yaqui Indians, then there was radical fault in the action of the trial court in giving the instruction complained of, and plaintiff is entitled to have that fault reviewed and corrected, even though there was no

objection or exception taken to that specified part of the charge.

Skuy v. United States, 261 Fed. 316;
Wiborg v. United States, 163 U. S. 632, 659; 41 L. Ed. 289;
August v. United States, 257 Fed. 388;
Brasfield v. United States, 272 U. S. 448, 71 L. Ed. 345;
New York C. R. Co. v. Johnson, 73 L. Ed. 315.

III.

THE THEORY OF THE DEFENSE WAS NOT ONLY IGNORED BY THE TRIAL COURT, BUT IT WAS ENTIRELY REPUDIATED BY INSTRUCTIONS DIRECTLY OPPOSED TO IT.

Plaintiff in error had a well-defined theory of defense, which he endeavored to embody in the instruction which the court refused to give. That theory was that a rebellion of the Yaqui Indians against the Republic of Mexico was in existence therein prior to the commission of any of the acts charged in the indictment, and if members of the armed forces of the Yaqui Indians came to the United States for the purpose of securing arms and ammunitions and then returning to rejoin the forces of the Yaqui Indians in Mexico, and if the plaintiff in error furnished arms and ammunition only for such Indians as had come from Mexico and intended to return to Mexico, and did not do anything more, his conduct did not constitute a violation of the neutrality statute, and he could not be properly convicted of a conspiracy to

violate said statute. The trial court entirely ignored that theory of the defense. It not only ignored that theory when it refused the requested instruction, but it acted in direct opposition to that theory throughout its instructions to the jury. This fact is recognized in the opinion filed by his Honor, Judge Wilbur.

There was one group of twenty-three Yaquis who left the insurrectionists in Mexico and went to Tucson, Arizona, to get rifles and ammunition. (Tr. p. 77.) It was plaintiff in error's contention throughout the trial that those Yaquis, in thus coming to the United States for that purpose and in obtaining the rifles and ammunition while here and in taking the same to Mexico for the purpose of rejoining the rebellion, were not guilty of a violation of our neutrality statute and could not be properly convicted of a conspiracy to violate that statute. And plaintiff further contended that if he gave or sold ammunition and supplies to that group of Yaquis and did nothing more, he was not guilty of the charge set forth in the indictment. Judge Wilbur, in his opinion, holds that if those twenty-three Yaquis obtained arms and ammunition at Tucson and returned therewith to Mexico, under the circumstances above stated, they were guilty of setting on foot a military expedition or enterprise to be carried on from Arizona against the Mexican government in violation of Section 13 of the Federal Penal Code. Judge Wilbur further holds that if plaintiff in error knowingly sold or gave arms and ammunition to that group of Yaquis and did absolutely nothing else, he could be found guilty of a violation of that statute. We respectfully take issue

with Judge Wilbur on that statement of the law involving as it does a construction of our neutrality statute. *Trumbull v. United States,* 48 Fed. 99 is direct authority to the effect that that military expedition, if such it may be called, was one begun, set on foot, provided and prepared for in Mexico and was to be carried on from Mexico and not from the United States.

We have referred to a group of twenty-three Yaquis because the evidence refers to such a group. (Tr. p. 77.) It is to be concluded from Judge Wilbur's opinion that if even two Yaquis left the insurrectionists in Mexico to obtain arms and ammunition, and went to Arizona for that purpose and immediately obtained the same and returned therewith to Mexico, they were guilty of putting on foot, etc., a military expedition against the Mexican government; and it is to be further concluded from Judge Wilbur's opinion that if plaintiff in error gave those two Yaquis arms and ammunition, and did nothing else, he too was guilty of violating the neutrality statute. Surely, such is not and cannot be the law. The opinion of Judge Dietrich, concurred in by Judge Rudkin, would indicate that they do not believe that the mere furnishing of arms and ammunition to any group of said Yaquis, however large or small the group may be, without any further word or action upon the part of the one so furnishing them, would amount to a violation of Section 13 of the Federal Penal Code.

Now, in the requested instruction, plaintiff in error endeavored to enunciate his theory and contention,

to wit: that if the Yaquis, to whom the prosecution claimed he furnished arms and ammunition, were already in rebellion against the Mexican government and came to the United States for the sole purpose of securing such arms and supplies and returning therewith to Mexico, and if plaintiff in error did not say or do anything other than give such arms and supplies to those Yaquis, he was not guilty of the charge laid in the indictment. The trial court refused the proffered instruction without any misunderstanding whatever concerning plaintiff in error's theory and contention as expressed therein. Judge Wilbur correctly summarizes that theory and contention and yet rejects it. Plaintiff in error was certainly entitled to have the jury instructed upon the subject matter of the instruction which he proposed and which the court refused to give. We are satisfied that that instruction, when closely analyzed by the court, will not be characterized as too broad or sweeping. Upon reconsideration, we are satisfied that this court will conclude that if the proposed instruction had been given the jury would simply have been advised that if the Yaquis, to whom the prosecution claimed that plaintiff supplied arms and ammunition, were already in rebellion and if they came to the United States for the sole purpose of obtaining such arms and supplies and returning therewith to Mexico, and if plaintiff in error gave them such supplies and ammunition and did absolutely nothing else, he could not be found guilty. Let us briefly quote the concluding clauses of the proposed instruction:

> "then **such furnishing of ammunition and provisions** woud not constitute either a military en-

> terprise or a military expedition, as those terms are used in the statute of the United States on which this prosecution is based,"

and

> "a conspiracy **MERELY** to furnish ammunition and provisions to Yaqui Indians who had come from Mexico and were intending to return to Mexico, under the circumstances above mentioned, would not be an offense against the United States."

Manifestly, if the instruction had been given the jury would have been advised as to the kind of a verdict to render, if they found that plaintiff in error **MERELY** furnished ammunition and provisions to those Yaquis and stopped there. The instruction which the court refused was vital to the defense. It fully advised the court of plaintiff in error's theory, and we submit that if there was any technical mistake or error in that instruction the court should have either corrected it, or otherwise instructed the jury on the general subject-matter of the proposed instruction. Quite to the contrary, however, the court advised the jury in direct opposition to the proposed instruction and to the theory of the defense enunciated therein, when it gave the following instruction:

> "To provide the means for such an enterprise is within the statute. To constitute this offense, the individual need not engage personally in the expedition. **If he furnish the munitions of war, provisions, transportation, clothing, or any other necessaries to men engaged in the expedition, he is guilty, for he provides the means to carry on the expedition."** (Tr. p. 216.)

It is respectfully contended that the action of the trial court in refusing the requested instruction, in not instructing the jury on plaintiff in error's theory of the case, of which the court was fully advised, and in giving instructions in repudiation of that theory, constituted error, for which the judgment should be reversed.

IV.

THE INDICTMENT, TAKEN BY ITS FOUR CORNERS, CHARGED PLAINTIFF IN ERROR WITH CONSPIRING TO SET ON FOOT AND PROVIDE THE MEANS FOR A MILITARY EXPEDITION TO BE CARRIED ON FROM MEXICO AND NOT FROM THE UNITED STATES.

Plaintiff in error reiterates his contention that the indictment charged him and his co-defendants with setting on foot and providing and preparing the means for a military expedition, **the object of which was the inciting of armed rebellion in the Republic of Mexico of the citizens of said Republic of Mexico against the government and authority there.** Such a military expedition or enterprise must needs be one to be carried on from Mexico and not from the United States, even though the indictment charges that the enterprise was one to be carried on from Tucson, Arizona. (*Trumbull v. United States,* supra.) The evidence too discloses that if plaintiff in error was directly or indirectly connected with any military expedition or enterprise, it was one to be carried on from Mexico and not from the United States. This general subject is fully discussed in our main brief

and we will not burden the court with any unnecessary repetition here.

In conclusion, it is respectfully submitted that for the reasons hereinabove stated, the court should grant a rehearing of this cause.

Dated, July 17, 1929.

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THEO J. ROCHE,
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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, July 17, 1929.

EDWARD I. BARRY,
Of Counsel for Plaintiff in Error and Petitioner.